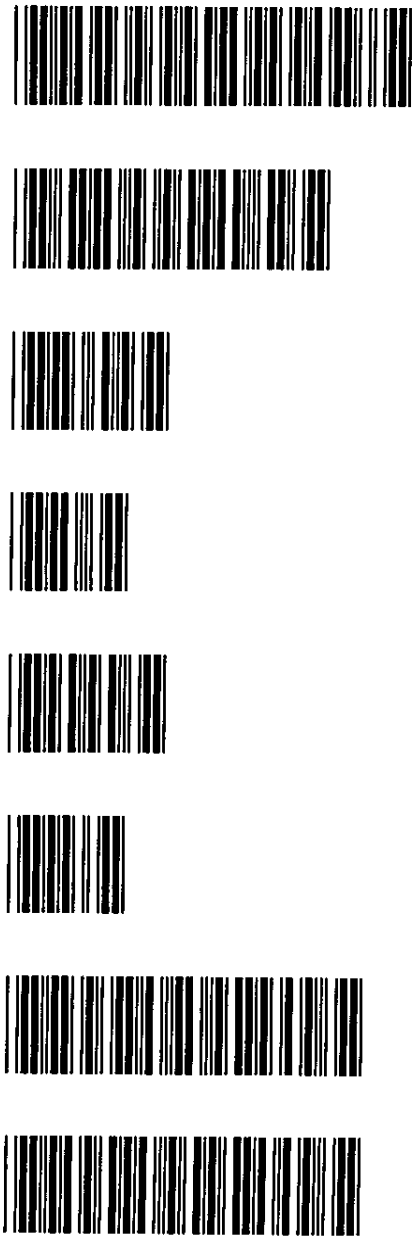
US DISTRICT COURT INDEX SHEET



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3:03-CV-1460 PARTNOY V. SHELLEY

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FRANK PARTNOY, an individual; LAURA ADAMS, an individual; RACHANA PATHAK, an individual; PETER STRIS, an individual; JASON WILSON, an individual; and CALIFORNIA INFORMED VOTERS GROUP, an unincorporated association,

Plaintiffs,

vs.

KEVIN SHELLEY, in his official capacity as Secretary of State for the State of California; SALLY MCPHERSON, in her official capacity as the Registrar of Voters for the County of San Diego; and CONNY MCCORMACK, in her official capacity as the Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants.

SCOTT J. RAFFERTY,

Intervenor.

CASE NO. 03CV1460 BTM (JFS)

ORDER GRANTING IN PART AND DENYING IN PART JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

The Court entered a final judgment in this case on July 29, 2003. On August 1, 2003, Scott Rafferty ("Rafferty") faxed a letter directly to chambers purporting to seek to intervene. He was directed to file a proper motion to intervene by August 6, 2003, which he did. The

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Court granted his motion to intervene on August 14, 2003. Rafferty filed his Complaint In Intervention on August 15, 2003. The Court *sua sponte* set this matter for expeditious resolution on cross-motions for judgment on the pleadings. Plaintiffs filed a motion to dismiss the complaint in intervention ("Pl. Mot."), Rafferty filed a motion for judgment on the pleadings ("Rafferty JMP") and Defendant Shelley, Secretary of State, filed an opposition to Rafferty's motion for judgment on the pleadings ("Shelley Op."). The Court held a hearing on the matter on August 20, 2003.

The Court finds there is no dispute of fact at issue in this case. The Court *sua sponte* set the matter for cross-motions for judgment on the pleadings. See Sitarek v. Shalala, 1994 WL 175116, * 1 (W.D.N.Y.) (approving simultaneous filing of cross-motions and answers); The Court placed all parties on notice that it was entertaining the entry of a final judgment on the papers filed pursuant to its scheduling order.

II. DISCUSSION

Mr. Rafferty contends that once the Court made the determination that California Elections Code Section 11382 was unconstitutional, it should not have proceeded to construe the term "election" in Section 11383 to mean "proposal." (7/29/03 Mem. Order at 13-14.) Rafferty contends that Section 11382 is an integral part and not severable from other provisions of the recall system because Sections 11381(c), 11382, and 11384 were part of a "legislative compromise" in which the current official was prevented from running to succeed himself because Section 11382 "ensured that every voter eligible to vote for successors had already voted for (or against) the incumbent in the same recall proposal. Section 11382, working in conjunction with §§ 11383 and 11384, ensured that an officer would not be removed from office unless a majority of all persons voting on his successor also voted to recall him, since it guaranteed that no person who had not voted for (or against) his recall would vote for a successor." Complaint at ¶ 13.

Because the Court's decision ostensibly strikes down one part of this legislative compromise, but not the other, he seeks to have the Court either (1) not enjoin the Secretary of State from applying Section 11382 to the current election and, instead, allow the state

legislature to devise a constitutionally appropriate replacement "compromise"; or (2) enjoin the entire recall election.

A. RULE 59(e)

Both Plaintiffs and Defendants contend that Rafferty's Complaint is "jurisdictionally time-barred from altering the existing Final Judgment" by Rule 59(e) of the Federal Rules of Civil Procedure.[1] (Pl. Mot. at 13; Shelley Op. at 2.) Furthermore, Plaintiffs claim that because Rafferty was not a party to this action on August 6, 2003, his Motion for Leave to Intervene cannot qualify as a Rule 59(e) motion. (Pl. Mot. at 14); See In Re NASDAQ Market-Makers Antitrust Litigation, 184 F.R.D. 506, 511 (S.D.N.Y. 1999) (Rule 59(e) motions can only be brought by parties; possible intervenors are not deemed parties permitted to bring motion). The Court finds neither of these arguments persuasive.

Although Rafferty delayed in filing his motion to intervene, the Court nonetheless allowed him to intervene in large part.[2] While there is case law supporting the proposition that a party can intervene for the purposes of filing an appeal after the ten-day period for a Rule 59(e) motion, see Romasanta v. United Airlines, 537 F.2d 915, 919 (7th Cir. 1976), in this case the Court did not allow Rafferty to intervene for purposes of appeal of the determination of the constitutionality of Section 11382 because in that respect his motion to intervene was both untimely and highly prejudicial.[3] The Court did grant Rafferty leave to

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[1] Under Rule 59, "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

[2] As the Court explained in its status conference on August 14, 2003: "I am not allowing you to intervene to take an appeal, because what you will have done, you will have disrupted this schedule to allow for orderly processing of this before the printing of the ballots. You will have entered it late in such a way . . . as to cause immense prejudice to the state and the county election boards, because they have to print the ballots. . . . [B]ut if you had entered it at a time earlier, then there would have been the opportunity for appellate review. You could have intervened, and then you could have appealed and there would have been time for appellate review, but you didn't do that." 8/14/03 Tr. at 23: 9-21. The Court also noted that in addition to failing to file a proper motion to intervene, Rafferty did not comply with Civil Local Rule 5.3 as to the proper manner to fax file documents with the Clerk. It also appears that there is no proof of service for his August 1, 2003 letter.

[3] When questioned by the Court as to why it took him three days to first contact the Court – from the July 29th decision to his August 1st letter – and over a week to file a proper motion to intervene, Rafferty first stated: "I sent a single-spaced document to the Court

file a complaint in intervention attacking the injunctive relief granted in the July 29, 2003 order. The parties contend that Rafferty is out of time because he can only seek relief under Fed. R. Civ. P. 59(e) by a motion filed within 10 days of the entry of the order.

The Court concludes that Rafferty's request to reconsider the injunctive relief is not untimely. First, by filing his motion to intervene on August 6, 2003, he was in essence simultaneously moving for reconsideration and was within the 10-day period. To contend that his request for reconsideration was untimely because intervention had not been granted until August 14, 2003, would effectively bar persons wishing to intervene and seek reconsideration from timely doing so. The motion to intervene was effectively a motion for intervention and reconsideration. Secondly, even if his request for relief under Rule 59(e) was untimely, relief is still appropriate under Fed. R. Civ. P. 60(b)(6) (relief from judgment for "any other reason justifying relief from operation of the judgment."). See Beentjes v. Placer County Air Pollution Control Dist., 254 F. Supp. 2d 1159, 1161 (E.D. Cal. 2003) (A "court may construe an untimely motion for reconsideration brought under Rule 59(e) as a motion based on Rule 60(b).") (citation omitted); Spacey v. Burgar, 207 F. Supp. 2d 1037, 1048 (E.D. Cal. 2001) ("Rule 60(b)(6) serves as the catch-all provision, conferring on the court broad discretion to relieve a party from final judgment upon such terms as are just.") (citations and internal quotations omitted). Therefore, the Court finds Rafferty's request for reconsideration by intervention not to be untimely.

B. SEVERABILITY

Because Rafferty's complaint in intervention is premised on Section 11382's non-severability, the Court must examine its prior implicit determination that this section was severable. As the Supreme Court stated, "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which

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within hours of discovering [sic] of the decision and it was styled Motion to Intervene. I realize it did not comply with the local rules, which frankly, I did not have so much as an opportunity to consult. I tried to get this in front of you as quickly as possible." 8/14/03 Tr. at 24:11-17. Upon further questioning, however, Rafferty admitted: "Okay, it was in the newspapers on the 30th. I saw it on the 30th. It was referred to in a brief that we filed late that afternoon." Id. at 26: 6-8.

is not, the invalid part may be dropped if what is left is fully operative as a law." Brockett v. Spokane Arcades, 472 U.S. 491, 506 n. 15 (1985) (citation omitted).

A federal court is empowered to determine whether an unconstitutional provision of a state statute can be severed. See Brockett, 472 U.S. at 506 (discussing a lower federal court's ruling on the constitutionality of a Washington state statute). In doing so, federal courts apply state law. See Leavitt v. Jane L., 518 U.S. 139 (1996); Valley Outdoor, Inc. v. County of Riverside, No. 02-55475, slip op. 8539, 8540 (9th Cir. Aug. 1, 2003). "The California Supreme Court has held that there are three criteria for severability under California law: the provision must be grammatically, functionally, and volitionally separable." Id. at 8540 (citing Calfarm Ins. Co. V. Deukmejian, 48 Cal. 3d 805, 821 (1989)). As the California Supreme Court has stated, "[a]lthough not conclusive, a severability clause normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable." Gerken v. Fair Political Practices Comm., 6 Cal.4th 707, 714 (1993) (internal citation and quotation marks omitted); see, also, In re Blaney, 30 Cal.2d 643, 655 (1947) ("In considering the issue of severability, it must be recognized that the general presumption of constitutionality, fortified by the express statement of a severability clause, normally calls for sustaining any valid portion of a statute unconstitutional in part.").

The California Elections Code does contain a severability clause, thus giving rise to a legislative presumption in favor of survival of the remaining valid recall provisions. California Elections Code, Section 3 provides that, "[i]f any provision of this code or the application thereof to any person or circumstance is held invalid, the remainder of the code and the application of that provision to other persons or circumstances shall not be affected thereby."

1. *Grammatically Separable*

Under the first step of California's severability test, it is clear that Section 11382 is mechanically and grammatically separable from the rest of the statute. The Court did not excise a single word or a phrase from any sentence. Nor did it remove one sentence from a paragraph. Rather, the Court struck down the entirety of one of many separately

numbered sections of the recall chapter. None of the parties contend that Section 11382 is not grammatically separable.

2. *Functionally Separable*

Second, the Court finds that the constitutionally invalid section is functionally separable from the other recall provisions. Section 11382 prevents the counting of votes for a successor unless that voter also cast a vote on the recall question itself. No other recall provisions explicitly deal with this same proposition. In particular there is no mention of how the votes on the recall or selection of a successor will be counted in Section 11381.

Rafferty contends that if Section 11382 is eliminated, Sections 11383 and 11384 will lose their meaning. These sections provide:

> § 11383. If one-half or more of the votes at a recall election are "No", the officer sought to be recalled shall continue in office.
>
> § 11384. If a majority of the votes on a recall proposal are "Yes", the officer sought to be recalled shall be removed from office upon the qualification of his successor.

Rafferty focuses on the use of the term "recall election" in Section 11383 and "recall proposal" in Section 11384. He contends that if Section 11382 is removed, confusion arises as to how the recall election is determined. He contends that since Section 11382 required all voters on the successor candidate to first vote on the issue of recall, the number of votes on the "recall election" and on the "recall proposal" would be the same. With the elimination of Section 11382, a different number of votes can be cast on the issue of recall and the issue of a successor. Rafferty contends that the officer, here the governor, can be removed only if a majority of the total ballots cast at the October 7, 2003 recall election (whether they be on the recall proposal only, the successor only, or both) are yes on the question of recall. The Secretary of State, however, contends that the governor is removed if a majority of the votes cast on the single "yes-no" question of whether the governor should be recalled is "yes." However, the Court need not determine how the majority is determined as long as it can be determined without Section 11382.

Unlike a state court, a federal court cannot explicitly "reform" a state statute. See

Tucker v. State of Calif. Dept. of Education, 97 F.3d 1204, 1217 (9th Cir. 1996) (stating that it is "not within the province of [a federal] court to 'rewrite' [a state law] to cure its *substantial* constitutional infirmities.") (emphasis added); see also, Kopp v. Fair Political Practices Commission, 11 Cal.4th 607 (1995) (exhaustively discussing the various means for reforming an otherwise unconstitutional statute). A federal court can, however, employ a range of interpretive tools to permissibly interpret or construe a state statute.[4] See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975) (a federal court can apply a narrowing construction on a state statute if the language is "easily susceptible of a narrowing construction."); 3570 East Foothill Blvd., Inc. v. City of Pasadena, 912 F. Supp. 1268, 1281 (C.D. Cal. 1996) ("As a general rule, a court is bound to construe a statute to avoid absurd results and favor public convenience.") (internal citation omitted); Legislature of the State of California v. EU, 54 Cal.3d 492, 534 (1991) (construing resulting language so that the invalid provision can be grammatically severed without affecting the operation of the remaining clauses).

In its earlier order, this Court construed the term "recall election" in Section 11383 to mean the same thing as the term "recall proposal" so that Section 11383 would effectively read "If one-half or more of the votes [on the recall proposal] are 'No', the officer sought to be recalled shall continue in office." Therefore, the Court interpreted Sections 11383 and 11384 as effectively working as reciprocal measures. See Section 11384 ("If a majority of the votes on the recall proposal are 'Yes', the officer sought to be recalled shall be removed from office upon the qualification of his successor."). An examination of the California Constitution and the legislative history of these sections strongly supports this interpretation.

The recall procedure was originally added to the California Constitution in 1911 and provided that: "If a majority of those voting on *said question of the recall* of any incumbent from office shall vote 'No,' said incumbent shall continue in said office. If a majority shall

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[4] See California Prolife Council Political Action Committee v. Scully, 989 F. Supp. 1282, 1290-91 (E.D. Cal. 1998) (stating that it is unnecessary to determine whether federal or state rules of construction apply under federal question jurisdiction because the "general rules of statutory construction are apparently identical under federal and California law.").

vote 'Yes,' said incumbent shall thereupon be deemed removed from such office, upon the qualification of his successor." Cal. Const., former art. XXIII, § 1, par. 6 (emphasis added). The statutory embodiments of this provision set forth the same sort of mechanism for deciding how the votes in the recall would be counted. See Cal. Pol. Code § 4021a, added by Stats. 1911, c. 342 p. 581 ("If the majority of those voting on said question of the recall of any incumbent shall vote 'No,' said incumbent shall continue in said office. If a majority shall vote 'Yes,' said incumbent shall thereupon be deemed removed from such office, upon the qualification of his successor."); Cal. Elec. Code § 11065, added by Stats. 1939, c. 26, p. 301 ("If a majority or exactly half of those voting on the question of the recall of any incumbent from office vote 'No,' the incumbent shall continue in office. If a majority vote 'Yes,' the incumbent shall be deemed recalled from office, upon the qualification of his successor."); Cal. Elec. Code § 27007, added by Stats. 1974, c. 233, p. 439 ("If a majority of those voting on said question of the recall of any incumbent from office shall vote 'No', said incumbent shall continue in said office. If a majority shall vote 'Yes, said incumbent shall thereupon be deemed removed from said office, upon the qualification of his successor."). It was not until the Elections Code revision of 1976 that this binary mechanism for counting the votes was split into separate sections and the words "recall election" used in one and "recall proposal" used in the other. See Cal. Elec. Code § 27343, added by Stats. 1976, c. 1437, p. 6451 ("If one-half or more of the votes at a recall election are 'No', the officer sought to be recalled shall continue in office."); Cal. Elec. Code § 27344, added by Stats. 1976, c. 1437, p. 6451 ("If a majority of the votes on a recall proposal are 'Yes' the officer sought to be recalled shall be removed from office upon the qualification of his successor.").

None of the parties have provided the Court with an authoritative explanation for this change much less any legislative history that would illuminate such an alteration in this heretofore consistent phraseology. The Report of the Joint Committee for the Revision of the Elections Code (which was incorporated into the Legislative Counsel's Report to the Governor on Assembly Bill No. 3467, which enacted these revisions) made no mention of

these two provisions, nor did it provide an explanation for these changes.

Finally, the Court views the current California Constitution as being highly instructive as to the meaning of these terms. Article 2, Section 15 of the Constitution states that: "If the majority vote on the question is to recall, the officer is removed and, if there is a candidate, the candidate who receives a plurality is the successor." West's Ann. Cal. Const. Art. II, § 15 (2002).

Based on a clear and common-sense reading of the language of Sections 11383 and 11384, the legislative history, and the current California Constitution, the Court finds that the words "recall election" in Section 11383 and "recall proposal" in Section 11384 are meant to be the same thing. While there is a difference of opinion as to whether the officer is recalled only if the yes votes constitute a majority of all the ballots cast on both the recall question and election of the successor or just the recall question, that difference does not affect severability.

In the Court's July 29, 2003 decision, the Court construed both Section 11383 and Section 11384 to refer to the number of yes or no votes cast on the question of whether the officer should be removed. The Court vacates that interpretation and holding (Memorandum Decision at page 14 lines 1-10 and page 16 lines 1-3) for two reasons. First, it is unnecessary to resolve this construction issue in determining whether Section 11382 can be severed from the remaining recall provisions, as votes for a successor will be counted even if the voter did not vote either "yes" or "no." The same rule of determining the outcome of the recall applies whether or not the voter did or did not vote "yes" or "no." Thus, the question of how to determine the result, that is, whether the proper denominator is the total ballots on the recall, successor or both, does not depend on whether Section 11382 remains effective.

Second, the California Courts, not this Court, should resolve the question of whether Sections 11383 and 11384 and California Const. Art. II, § 15 refer to the majority of votes cast on the sole question of whether the officer should be recalled or the majority of the combined number of ballots cast solely on recall, plus those cast solely on successor, plus

those cast on both issues. Since the outcome of the issue of severability does not depend on that question, this Court should not make that constructional determination. The Court's previous holding construing the meaning of Sections 11383 and 11384 is therefore vacated as unnecessary to a decision in this case.

3. *Volitionally Separable*

Finally, the Court finds that Section 11382 is volitionally separable. The test of volitional separability is whether it is "reasonable to suppose that those who favored the proposition would be happy to achieve at least some substantial portion of their purpose." Gerken v. Fair Political Practices Com, 6 Cal.4th 707, 715 (quoting Santa Barbara Sch. Dist. v. Superior Court, 13 Cal.3d 315, 331 (1975)). Rafferty provides a spirited account of how backroom deals in the 1911 California Legislature might have resulted in a legislative compromise from which Section 11382 can not be severed. (Rafferty MJP at 4-7.)

According to Rafferty, the state legislature struck a deal whereby the number of signatures required to institute a recall election would be reduced "provided that the incumbent would not be removed without a clear, affirmative majority" of those voting on the recall question. (Rafferty MJP at 5.) On this basis, the legislators replaced "a conventional, one-part election with a two-part question – the 'yes/no' vote followed by the election of a successor by plurality. As part of this package, the incumbent lost his right to run to succeed himself." (Id.) Rafferty contends that the inability of the officer to run to succeed himself is inextricably tied to the requirement that a voter vote on recall before he or she can vote on a successor.

Rafferty cites to Franklin Hichborn's Story of the Session of the California Legislature of 1911 (1911) for support for his historical analysis.[5] However, it is unclear from Hichborn's account whether the requirement that one vote on recall before the vote counted as to a successor was inextricably tied to the provision that a recalled officer could not replace himself. Furthermore, there is no evidence that the legislators would not have proposed the

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[5] The California Supreme Court has found the views of Hichborn, an observer of the 1911 legislative session "to be particularly illuminating." Rossi v. Brown, 9 Cal. 4th 638, 700 n.7 (1995).

balance of the recall provisions without the Section 11382 requirement.

Even if there were sufficient evidence of the legislature's intent in 1911, a question which the Court need not reach,[6] Rafferty's analytical lens is focused on the wrong subject because this provision had to be approved by the voters not the legislature. As the California Supreme Court stated in Delaney v. Superior Court, 50 Cal.3d 785, 798 (1990), "In the case of a constitutional provision adopted by the voters, their intent governs." See also Jahr v. Casebeer, 70 Cal.App.4th 1250, 1254 (1999) (stating the same). In this case it is clear that in passing the recall provisions to the California Constitution, the voters wanted to effect a mechanism for removing state officials before the expiration of their terms of office. There is no evidence before the Court that the voters were aware of the allegedly interlinking "legislative compromise"described by Rafferty, nor is there anything apparent in the plain text of the language adopted that would have signaled such.[7]

Finally, and conclusively, in the view of this Court, California's voters approved

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[6] The Court does note, however, that such statements of individual legislators, while they might be "illuminating," are not dispositive. See Quintano v. Mercury Casualty Company, 11 Cal.4th 1049, 1062 (1995) (the statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the legislature as a whole in adopting a piece of legislation); In re Marriage of Bouquet, 16 Cal.3d 583, 589-90 ("[I]n construing a statute we do not consider the motives or understandings of individual legislators who cast their votes in favor of it. [ ] [N]o guarantee can issue that those who supported his proposal shared his view of its compass.").

[7] In Rossi v. Brown, the California Supreme Court noted that when construing constitutional provisions:

> [T]he intent of the drafters may be considered by the court if there is reason to believe that the electorate was aware of that intent . . . and we have often presumed, in the absence of other indicia of the voters' intent such as ballot arguments . . . or contrary evidence, that the drafters' intent and understanding of the measure was shared by the electorate. . . . The historic context in which a measure is drafted is also relevant in construing the 1911 amendments which added the initiative, referendum, and recall to the Constitution. We have found the views of Franklin Hichborn, a contemporary observer of the 1911 and subsequent legislative sessions, to be particularly illuminating.

9 Cal.4th at 700 n.7 (internal citations omitted). There is no evidence as to what was actually conveyed to the electorate in 1911 concerning the recall provisions. Moreover, Hichborn's account may aid in interpretation, but not on the question of volitional severance. Most importantly, whatever was the intent in 1911, the voting requirement of Section 11382 was in fact severed from the Constitution in 1974.

constitutional amendments to the recall process in 1974 that effectively retained crucial aspects of the recall process in the Constitution and moved others, of lesser significance, into statutes. See Ballot Pamph., Gen. Elec. (Nov. 5, 1974) Proposition 9, at pp. 32-35, 86-87 (stating that the proposition removes procedural or technical details from the Constitution).[8] As part of this amendment, the constitutional language requiring voters to vote on the question of the recall in order for their vote on a successor to count was deleted from the Constitution and moved to the Elections Code (presently Section 11382). As part of a state statute, this section could thenceforth be amended or completely repealed by the enactment of legislation rather than the more difficult procedure necessary to amend the Constitution.

The removal of the substance of Section 11382 from the California Constitution's provisions on recall is the most powerful indicia of severability. The people of California evidently believed the provisions of Section 11382 were not necessary to continue to effectuate the recall procedures as they severed them from the Constitution and relegated them to statutes that could be repealed more easily, even without voter consent. Notwithstanding what a few legislators had in mind in 1911, the California voters did not attribute such significance to the requirement that one must first vote on the recall question in order for one's vote on a successor to count.

Indeed, the California Constitution retains the provision that a recalled officer may not run to replace himself. West's Ann. Cal. Const. Art. II, § 15(c) (2002) ("The officer may not be a candidate . . . ."). While this provision was deemed essential, the provision in Section 11382 was not.

Under settled California Supreme Court law, an invalid recall provision is severable if the remainder of the recall initiative would likely have been adopted by the people had they foreseen the invalidity of the provision. Gerken at 716. As stated by the California Supreme Court in Santa Barbara Sch. Dist. v. Superior Court, 13 Cal.3d 315, 331-332 (1975), "If the

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[8] The ballot materials regarding Proposition 9 are available at http://holmes.uchastings.edu/ballot_pdf/1974g.pdf.

remainder of the law reflects a substantial portion of the electorates' purpose that part should be severed from the invalid provision and given effect." Stated another way, "the test is whether it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed that it would have separately considered and adopted them in the absence of the invalid portions." Gerken at 715-716 (quoting from People's Advocate, Inc. v. Superior Court, 181 Cal. App. 3d 316, 332-33 (1986)).

Here there is no reason to believe that the California voters did not want the remaining recall procedure in the absence of Section 11382. Therefore, the invalidity of Section 11382 does not affect the validity of the remaining recall provisions in the California Constitution and Elections Code and Rafferty's request to either vacate the injunction and allow the recall election to proceed with Section 11382 operational or enjoin the entire recall election is denied.

C. COURT'S POWER TO ISSUE AN INJUNCTION

Rafferty argues that legal precedent, including Supreme Court cases, precludes injunctive relief against imminent elections, even where the right to vote has been abridged. Clearly, this is not the case. See, e.g., Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966) (holding that the district court should have enjoined an election where a number of African-Americans were denied the right to register to vote as a result of Mississippi laws imposing a four-month registration requirement and a poll-tax requirement).

The cases Rafferty cites do not support the proposition that a court cannot issue injunctive relief in connection with an imminent election. For example, in Chisom v. Roemer, 853 F.2d 1186 (5th Cir. 1988), the court held that it would not be proper to enjoin a judicial election, in large part because of uncertain consequences to Louisiana's judicial system. However, the court noted: "It cannot be gainsaid that federal courts have the power to enjoin state elections." Id. at 1190.

Rafferty's reliance on the Supreme Court cases is similarly misplaced. None of these cases hold that an injunction is an improper remedy in the face of unconstitutional election laws. In Fortson v. Morris, 385 U.S. 231 (1966), the Supreme Court reversed the three-

judge district court panel's order enjoining the state assembly from electing a governor because the Supreme Court found the challenged election law to be constitutional. In Whitcomb v. Chavis, 396 U.S. 1064 (1970), the Supreme Court stayed pending appeal the district court's order which redistricted the state. The Court did not hold that district courts cannot enjoin elections. The caselaw is replete with instances where federal courts have issued injunctions against unlawful election practices. See, e.g., Lucas v. Townsend, 486 U.S. 1301, 1303-05 (1988) (Kennedy, J., Circuit Judge) (enjoining election); Gilmore v. Greene County Dem. Party Exec. Comm., 368 F.2d 328 (5th Cir. 1966) (staying election).

At any rate, here, the Court is not enjoining an election. Rather it is enjoining the refusal to count certain votes. Again, it is well-established that federal courts may take such actions. See, e.g., Matsumota v. Pua, 775 F.2d 1393, 1398 (9th Cir. 1985) (reversing district court and ordering entry of injunctive relief on remand that prohibits enforcement of Section 12-203 of election law); Perry v. Bartlett, 231 F.3d 155, 162 (4th Cir. 2000) (permanently enjoining State from enforcing Section 12A of Election Law given violation of First Amendment); California Democratic Party v. Lungren, 919 F. Supp. 1397, 1405 (N.D. Cal. 1996) (permanently enjoining enforcement of Article II, Section 6 of California Constitution in state elections).

D. INJUNCTION AS APPLIED TO LOCAL JURISDICTIONS

Rafferty also claims that the Court's injunction improperly covers the recall of local officials because "Plaintiffs lack standing since they fail to allege that they reside within any local jurisdiction subject to § 11382 . . . ." Rafferty Complaint at ¶ 24. Rafferty has not presented any support for his implicit proposition that Section 11382 is applied any differently to local recall elections than it is in state-wide recall elections. Section 11382 applies to all recall elections in California except those provided for under city or county charters. See West's Ann. Cal. Const., Art. II, § 19; see also Cal. Elections Code § 11000. Rafferty has not demonstrated that the effect of the application of Section 11382 to local elections is any different than as to state-wide elections or that there is a compelling basis for its application to local elections. Since Section 11382 does not apply to recall elections provided for by a

city or county charter, or ordinance adopted pursuant to such a charter, the Court's decision does not affect those recall elections. Therefore, the Court finds no reason to modify its determination that the declaratory and injunctive relief applies to all future recall elections covered by Elections Code, Section 11000.

E. INJUNCTION AS APPLIED TO RAFFERTY AS AN INDIVIDUAL

Rafferty alleges that the Court's injunction is overbroad in that it applies to him as a private person and restricts his First Amendment rights. As the Court explained at the hearing on Rafferty's motion to intervene, the injunction was only meant to reach state officials carrying out their official duties. However, in order to prevent any possible further confusion on this issue, the Court will modify the language of its injunction so as to remove any possible reference to the actions of private individuals.

F. LACHES/UNCLEAN HANDS

In his Complaint Rafferty alleges that "plaintiffs' claims are barred by the doctrine of laches, in that they failed to seek timely relief, (paras. 23, 25) and unclean hands (para. 26)." (Rafferty Complaint at ¶ 23.) Both of these arguments lack merit. Rafferty does not allege that Plaintiffs intentionally delayed bringing their suit after the recall election was certified, only that they could have brought their suit earlier. The Court has serious doubts as to whether Plaintiffs' suit would have been ripe for adjudication prior to the official certification of a recall election. In any case, Plaintiffs filed their suit the same day the Lieutenant Governor certified the Davis Recall election. The Court is satisfied that Plaintiffs did not improperly delay filing their claims in this case, and, thus, their action is not barred by the doctrine of laches.

As for Rafferty's unclean hands argument, the complaint in intervention alleges no facts that support the denial of injunctive relief. Therefore, this argument is wholly without merit.

III. CONCLUSION

The Court has accelerated these proceedings given the extraordinary nature of the matters addressed and to allow for orderly appellate review. The complaint in intervention

is ripe for adjudication on the merits as no facts are in dispute and only purely legal issues remain. Rafferty is not entitled to the relief he seeks, that is, to vacate the injunction as to applying Section 11382 or enjoining the entire recall election. The Court does, however, modify the injunction to clarify that it does not apply to Rafferty or any private citizen. The Court further vacates its July 29, 2003 holding construing the meaning of California Elections Code Sections 11383 and 11384 as unnecessary to a decision in this case and more appropriately left for the California courts. Other than the limited relief granted, judgment shall be entered dismissing Scott Rafferty's complaint in intervention with prejudice.

Although Defendants filed an opposition to Rafferty's motion for judgment on the pleadings, they did not make their own motion for judgment on the pleadings. It is proper, however, for the Court to *sua sponte* enter judgment on the pleadings dismissing the case. The Court set this matter for expeditious resolution on cross-motions for judgment on the pleadings and fully informed all the parties that, if appropriate, the Court would enter a final judgment so that the case would be ripe for appellate review. All three Defendants have filed their answers. Because the Court has determined that there are no factual disputes at issue and Rafferty is not entitled to relief as a matter of law on any of his remaining claims, it is proper for the Court to enter final judgment. See Flora v. Home Fed'l Sav. & Loan Ass'n, 685 F.2d 209, 212 (7th Cir. 1982) (As long as both parties have the opportunity to be heard, the legal sufficiency of the complaint may also be raised by the court *sua sponte*, and judgment entered accordingly); Schwarzer, Tashima, & Wagstaffe, Cal. Practice Guide: Fed. Civ. Pro. Before Trial, § 9:329 (the Rutter Group 2003) (stating the same).

IT IS SO ORDERED.

Dated: August 21, 2003

HONORABLE BARRY TED MOSKOWITZ
United States District Judge

Copies to:
All Parties and Counsel of Record